

Section 2.7

Citation Strategies for Worker Safety Violations

Questions posed at the Roundtable

This document provides guidance on the following questions posed at the Hearing Officer Roundtable:

- Is a County Agricultural Commissioner (CAC) required to cite an employee for personal protective equipment (PPE) violations if the employer can successfully assert the independent employee action defense (IEAD)?
- What factors can the CAC rely on to identify the responsible party for PPE violations?
- Should the CAC cite the employer, employee, or both?
- How should the county advocate respond if, during a hearing, the respondent claims the employee acted independently with regard to PPE violations?

Background

Before taking any enforcement action against an employer or an employee for a PPE violation, CACs must understand the laws, regulations, and policies applicable to this issue.

This document addresses questions posed at the Hearing Officer's Roundtable through discussions of:

- General sections of law versus specific provisions of law/regulations;
- Employer and employee responsibilities;
- Employer's IEAD;
- CAC's discretion concerning citing employees;
- Specific elements required when citing employees;
- Citing Food and Agricultural Code (FAC) section 12973 (**not recommended** in "PPE cases");
- Citing both parties (**not recommended** in "PPE cases"); and
- Defending the CAC's decision to cite an employer.

Continued on next page

Citation Strategies for Worker Safety Violations, Continued

Citing general versus specific provisions

Based on case law dating back to the 1800's, the California Supreme Court holds that:

- A general provision is controlled by specific provisions, and
- Specific provisions relating to a particular subject are **controlling** over a general provision and **govern** in respect to that subject.

The California Legislature has authorized the Department of Pesticide Regulation (DPR) to adopt “specific” regulations to effectively implement the Legislature’s intent as reflected in certain general provisions of FAC Divisions 6, 7, and 13, *including pesticide worker safety*.

FAC section 12973 is a “general provision” requiring that pesticides not be used in conflict with their registered label, but makes no mention of specific worker safety requirements or employer-employee responsibilities in relation to worker safety. As required by FAC section 12781, DPR has adopted pesticide worker safety regulations (3CCR section 6700, et seq.) that set forth specific worker safety requirements and specify the responsibilities of employers and employees in meeting those requirements. These regulations more than fully implement in California law the protections the Federal Insecticide, Fungicide, and Rodenticide Act’s worker protection standards indirectly incorporated by FAC section 12973.

Specific legal advice

Therefore, when initiating an administrative civil penalty action against an employer for matters involving worker (employee) safety, DPR strongly encourages CACs to cite a specific worker safety regulation rather than the FAC section 12973 general provision. For the purposes of this discussion, 3CCR sections 6700, et seq. **govern** and **control** FAC section 12973.

Continued on next page

Citation Strategies for Worker Safety Violations, Continued

Employer responsibilities

California law places the preponderance of responsibility for employee safety *on the employer*.

Specifically, 3CCR section 6702 (a) and (b) require **employers** to:

- Comply with regulations applicable to employer conduct;
 - Know about applicable safe use requirements in pesticide labeling and regulation;
 - Provide employees with comprehensive pesticide-related safety information;
 - Supervise employees to assure compliance with applicable requirements and safe handling practices;
 - Provide a safe work place and require employees to follow safe work practices; and
 - Take all reasonable measures to assure employee compliance with applicable laws, regulations, and pesticide label requirements.
-

Employee responsibilities

California law recognizes that employees also bear some responsibility for their own safety in the pesticide work place.

3CCR section 6702(c) requires employees to:

- Use the PPE and safety equipment required by regulation or label, *which has been provided by the employer at the work site in a condition that will provide the intended safety or protection*.
-

Continued on next page

Citation Strategies for Worker Safety Violations, Continued

Elements of the IEAD

The Independent Employee Action Defense is a defense that may be raised by an employer when the employer is being blamed for the deed or misdeed of its employee in regard to employee safety. If the employer does not raise the defense, it need not be considered. The CAC is not required to consider it unless it is raised and its requirements established.

The IEAD recognizes that employees sometimes act independently of, and contrary to, their employer's instructions and against their employer's best safety efforts. DPR has allowed employers to use, and CACs to consider, the IEAD because the California Occupational Safety and Health Appeals Board (OSHAB) recognizes it. To successfully assert the IEAD, an employer must prove unequivocal compliance with the requirements described below:

Element	Description
Comprehensive written training program	The employer has a written training program, which includes training employees in matters of pesticide safety with respect to their particular job assignments.
Compliance with training requirements	The employer complied with all applicable training requirements in DPR's pesticide worker safety regulations, with respect to the employee.
Written disciplinary action policy and enforcement of policy against employee	The employer has a written workplace disciplinary action policy that it enforces against employees who violate the employer's safety requirements, and the employer <i>enforced</i> the policy against the employee for the incident.
Demonstrate prior employee knowledge	At the time of the incident, the employee, through his/her pesticide safety training or knowledge of the employer's work place disciplinary action policy, knew the employer required its employees to utilize label- or regulation-specified PPE.

Continued on next page

Citation Strategies for Worker Safety Violations, Continued

CAC discretion to cite only employers

There is no requirement in law or policy that requires CACs to cite **employees** alone or in addition to employers for specific PPE violations.

In fact, most situations where an **employee can** be cited for not wearing PPE will also be a situation where the employer can successfully raise the IEAD. To say it another way, if the CAC can successfully maintain an action against the employer, in most cases, the CAC cannot charge the employee. CACs cannot cite an employee for a PPE violation under 3CCR section 6702(c) unless the employee is licensed or certified (under either Chapter 14, Division 3, of the Business and Professions Code or Chapters 5, 8, Division 6, of the FAC) **and** all the same requirements that would allow the employer to assert the IEAD have been established (see section 6130(b) of 3CCR).

There may be a situation where the CAC can cite an **employer** for a violation of specific PPE regulations even when the employer's safety program meets the requirements of the IEAD. Close scrutiny of the employer's actions (or lack of) will often reveal one or more violations of the applicable elements in 3CCR section 6702(b) that contributed to an employee not wearing the required PPE. When preparing a case against an employer under these circumstances, the CAC's Advocate at the hearing should be prepared to explain how the employer did not meet its legal responsibilities under 3CCR section 6702(a) or (b) resulting in the employee's failure to meet the PPE requirements.

Citing the most appropriate Respondent and regulation

CACs who wish to bring civil penalty actions against **employees** as a tool in their enforcement program may do so under the very limited circumstances that are set forth in 3CCR section 6130. *The appropriate regulation to cite for the employee's failure to wear the required PPE is 3CCR section 6702(c).*

Continued on next page

Citation Strategies for Worker Safety Violations, Continued

Citing the most appropriate Respondent and regulation (continued)

The table below identifies the key information that the CAC must obtain before reaching the decision to bring an administrative civil penalty action against an employee for violations of the PPE requirements found in 3CCR section 6702(c).

Proceeding step by step through the chart below should lead to the correct decision as to who should be charged with the PPE violation in a given situation and greatly reduce the risk of reversal of the CAC's decision if it is appealed to the Director or the Disciplinary Review Committee (DRC).

Step	Action
1	Was the PPE available to the <i>employee</i> at the worksite? <ul style="list-style-type: none">• If YES, go to Step 2.• If NO, cite the employer under the appropriate section of 3CCR section 6738.
2	Was the PPE in good condition? <ul style="list-style-type: none">• If YES, go to Step 3.• If NO, cite the employer under the appropriate section of 3CCR section 6738.
3	Did the <i>employee</i> possess a current pesticide applicator's license or certificate issued by DPR, or a license/certificate issued by the Structural Pest Control Board? <ul style="list-style-type: none">• If YES, go to Step 4.• If NO, cite the employer under the appropriate section of 3CCR section 6738.
4	Do the employer's safety programs and disciplinary program and actions meet the IEAD criteria unequivocally? <ul style="list-style-type: none">• If YES, the CAC may cite the <i>employee</i> under 3CCR section 6702(c).• If NO, cite the employer under the appropriate section of 3CCR section 6738 or 6702(a) or (b).

More specific legal advice

The bottom line is that you should not use FAC section 12973 for personal protective equipment violations, unless you cannot find a more specific regulation to charge.

Continued on next page

Citation Strategies for Worker Safety Violations, Continued

Citing both parties can rarely be justified

DPR believes that citing both the employer and the employee for an employee's failure to wear the required PPE can rarely be justified as an appropriate exercise of discretion because it does not advance the goal of compliance or deterrence of the State or local Pesticide Use Enforcement program. Policy (IEAD as discussed in ENF 2001-55 and this document) and regulation (3CCR section 6702) provide CACs with ample and effective tools to determine the single, most responsible party when an employee is not wearing the required PPE. The party ultimately responsible should be held accountable if future compliance is the goal.

If a CAC is considering citing both parties, the CAC should question his/her reasons and the consequences of his/her actions –

- Is this being done to increase the amount of penalties collected?
 - Is this being done to hedge against a dismissal of one of the cases by a Hearing Officer?
 - Is this being done to make a statement? Does it make a good statement about the CAC's fairness?
 - Does it solve the compliance problem?
-

Employer's assertion that it is not responsible for acts of its employees

The Respondent has the right to enter anything into the hearing record that it feels is germane to its case. The Hearing Officer can weigh and consider any information presented by either side. CACs and Advocates should expect an employer to claim it met its worker safety responsibilities and be prepared with their response.

If the CAC cited an employer for a specific 3CCR section 6738 violation, then, upon proof, the employer can be held responsible. The Advocate should be prepared, if he/she can, to explain how the employer failed to fulfill one or more of their responsibilities listed in 3CCR section 6702 (a) or (b) and how this failure allowed the violation of 3CCR section 6738 to occur.

If the CAC cited an employer under FAC section 12973 and the employer proved during the hearing that they met IEAD criteria, provided the employee with PPE in good condition at the worksite, and that the employee was licensed, then the Hearing Officer must dismiss the case. By citing FAC section 12973, and not a specific worker safety regulation, the CAC cannot argue his/her case based on the employer-employee responsibilities in 3CCR section 6702.

Continued on next page

Citation Strategies for Worker Safety Violations, Continued

References

- 3CCR section 6700, et seq.
- 3CCR sections 6702 and 6738
- Enforcement Letter 2001-55
- FAC section 12973

“Et seq.” is an abbreviation of the Latin “et sequentes.” It means “and those (pages or sections) that follow.” In our case, “3CCR section 6700, et seq.” would mean “3CCR section 6700 through 6795,” or “all of the sections pertaining to worker safety that follow 3CCR section 6700.”
